85-432
No.

# In The Supreme Court
OF THE
# United States

Supreme Court, U.S.
FILED
SEP 14 1985
JOSEPH F. SPANIOL, JR.
CLERK

OCTOBER TERM, 1985

AIR TRANSPORT ASSOCIATION OF AMERICA
PETROLEUM MARKETERS ASSOCIATION OF AMERICA
THE JOBBERS' GROUP
INDEPENDENT GASOLINE RETAILERS
*Intervenors-Petitioners,*
vs.
EXXON CORPORATION,
*Defendant-Respondent,*
and
UNITED STATES OF AMERICA,
*Plaintiff-Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

RICHARD T. WILLIAMS*
NAOMI A. BRUNNER
KADISON, PFAELZER, WOODARD, QUINN & ROSSI
707 Wilshire Blvd., 40th Fl.
Los Angeles, California 90017
(213) 688-9000
*Attorneys for Air Transport Association of America*

ALPHONSE M. ALFANO
DOUGLAS B. MITCHELL
ROBERT S. BASSMAN
BASSMAN, MITCHELL AND ALFANO
Suite 1000
1707 H Street, N.W.
Washington, D.C. 20006
(202) 466-6502
*Attorneys for Petroleum Marketers Association of America and The Jobbers' Group*

JERRY S. COHEN
MICHAEL D. HAUSFELD
PATRICIA F. BAK
KOHN, MILSTEIN, COHEN & HAUSFELD
Suite 600
1401 New York Ave., N.W.
Washington, D.C. 20005
(202) 628-3500
*Attorneys for Independent Gasoline Retailers*

* Counsel of Record

Bowne of Los Angeles, Inc., Law Printers (213) 742-6600.

## QUESTIONS PRESENTED

Section 209 of the Economic Stabilization Act of 1970 ("ESA"), as amended, Pub. L. No. 92-210, 85 Stat. 743, authorizes restitution to remedy violations of federal price controls, in this instance crude oil price controls. The questions presented are:

1. Whether in actions for restitution under §209 of the ESA intervenors admitted as of right pursuant to Federal Rule of Civil Procedure 24(a) as purchasers asserting injury from having borne the impact of crude oil overcharges, yet may thereafter be denied all opportunity to present evidence of that injury forming the basis for their intervention.

2. Whether restitution of crude oil overcharges in suits under §209 of the ESA requires affording to injured purchasers some opportunity to present evidence of their injury and some opportunity to be heard on the design of an appropriate remedy, absent which opportunities procedural due process has been denied to them.

3. Whether summary judgment may properly issue pursuant to §209 of the ESA and Federal Rule of Civil Procedure 56(c) declaring impossible all restitution to injured individual purchasers without prior evidentiary inquiry into whether any individual purchasers may be identified and their injury ascertained or estimated.

4. Whether the judgment on remedy below so departs from the compensatory standards of equitable restitution as to portend significant increased litigation over substitute remedies in numerous pending but unresolved judicial and DOE proceedings.

## PARTIES TO THE PROCEEDINGS

The following is a list of the parties to the proceedings below in the Temporary Emergency Court of Appeals of the United States, as required by Supreme Court Rule 21.1(b). A list of the parent companies, subsidiaries and affiliates (except wholly owned) of the corporate petitioners, as required by Supreme Court Rule 28.1, is also set forth below.

*Petitioners*

Petitioner, Air Transport Association of America, intervenor below, is a non-profit trade association representing the following commercial airlines:

Air California

Parent: Air Cal Investments, Inc.

Air Florida, Inc.

Parent: Air Florida System, Inc.

Alaska Airlines, Inc.

Aloha Airlines, Inc.

Subsidiaries: Aloha Facilities, Inc.

American Airlines, Inc.

Parent: AMR Corporation

Affiliates: Flagship International, Inc.
American Airlines Training Corporation
AA Development Corporation
AA Energy Corporation

Subsidiaries: American Airlines de Mexico, S.A.
Caribbean Data Services, Ltd.

Best Airlines, Inc.

Parent: Columbia Sussex Corp.

Braniff International

Parent: Braniff International Corp.

Affiliates: BIC Guardian Services, Inc.
Braniff Education Systems, Inc.
Braniff Internati nal Hotels, Inc.
Braniff Realty Company

Capitol Air, Inc.

Subsidiaries: Capitol Air Sales, Inc.
Air Reservations, Inc.

Continental Airlines, Inc.

Parent: Continental Airlines Corp.

Affiliate: Texas International Airlines, Inc.

Delta Air Lines, Inc.

Subsidiaries: Dataslink Business Systems, Inc.
Epsilon Trading, Inc.

Eastern Air Lines, Inc.

Subsidiaries: Eastern Air Lines of Puerto Rico, Inc.
Terminal Sales Co.
Dorado Beach Development, Inc.
Dorado Beach Estates, Inc.
Eastern Air Lines, S.A.
EAL Properties, Inc.

Evergreen International Airlines, Inc.

Parent: Evergreen International Aviation, Inc.

Affiliate: Evergreen Helicopters, Inc.

Subsidiary: Evergreen Tours, Inc.

Federal Express Corporation

Subsidiary: Federal Express Leasing Corp.

The Flying Tiger Line, Inc.

Parent: Tiger International, Inc.

Subsidiaries: Skyvoyager Air, Inc.
Tiger Trading Co.
Flying Tiger Air Services, Inc.
Swap, Inc.

Frontier Airlines, Inc.

Parent: Frontier Holdings, Inc.

Hawaiian Airlines, Inc.

Subsidiary: HAL, Inc.

Midway Airlines, Inc.

Muse Air Corporation

Northwest Airlines, Inc.

Subsidiaries: Montana Enterprises, Inc.
Tomisato Shoji Kabuskiki Kaisha
Affiliated Enterprises, Inc.

Ozark Air Lines, Inc.

Pan American World Airways, Inc.

Subsidiary: Pan Am World Services, Inc.

Piedmont Aviation, Inc. d/b/a Piedmont Airlines

Affiliate: Norfolk Southern Corporation

Subsidiary: Air Service, Inc.
Aviation Supply Corporation

PSA — Pacific Southwest Airlines, Inc.

Parent: PSA, Inc.

Affiliates: Airline Training Center
Pacific Southwest Airmotive
Pacific Southwest Trading Co.

Pacific Southwest Exploration Co.
PSA Leasing, Inc.
PSA Holidays, Inc.

Republic Airlines, Inc.

Subsidiary: Republic Energy, Inc.

Trans World Airlines, Inc.

Affiliates: Canteen Corp.
Century 21 Real Estate Corp.
Hilton International Co.
Spartan Food Systems, Inc.
Trans World Corp.

United Airlines, Inc.

Parent: UAL, Inc.

Affiliates: Mauna Kea Properties, Inc.
United Airlines Credit Corp.
Westin Hotel Company
GAB Business Services, Inc.
UAL Capital Corporation
146 Haynes Corporation
Olohana Corporation

Subsidiaries: Mileage Plus, Inc.
E & T Trading Corporation
United Airlines Capital Corporation
United Airlines Credit Corporation
United Airlines Third Capital Corp.
Algonquin Realty, Inc.
Dempster Properties
J & N Trading Corporation
The Linneman Corporation
United Airlines Space Technologies

USAir, Inc.

Parent: USAir Group

Western Airlines, Inc.

Wien Air Alaska, Inc.

Parent: JJF Investments, Inc.

Petitioner, Petroleum Marketers Association of America, intervenor below *sub nomine* National Oil Jobbers Council, is a non-profit trade association comprised of the following associations:

Alabama Oilmen's Association
Arizona Petroleum Marketers Association
Arkansas Oil Marketers Association, Inc.
California Independent Oil Marketers Association
Colorado Petroleum Marketers Association
Empire State Petroleum Association
Florida Petroleum Marketers Association
Fuel Merchants Association of New Jersey
Georgia Oilmen's Association
Idaho Oil Marketers Association
Illinois Petroleum Marketers Association
Independent Connecticut Petroleum Association
Independent Oilmen's Association of New England
Indiana Oil Marketers Association, Inc.
Kansas Oil Marketers Association
Kentucky Petroleum Marketers Association
Louisiana Oil Marketers Association
Michigan Petroleum Association
Mid-Atlantic Petroleum Distributors Association, Inc.
Mississippi Petroleum Marketers Association
Missouri Oil Jobbers Association
Montana Chapter, Intermountain Oil Marketers Association
Nebraska Petroleum Marketers, Inc.

New Mexico Petroleum Marketers Association
North Carolina Petroleum Marketers Association
Northwest Petroleum Association
Oil Jobbers of Wisconsin, Inc.
Oil Petroleum Marketers Association
Oklahoma Oil Marketers Association
Oregon Petroleum Marketers Association
Pennsylvania Petroleum Association, Inc.
Petroleum Marketers of Iowa
South Carolina Oil Jobbers Association
South Dakota Petroleum Marketers Association
Tennessee Oil Marketers Association
Texas Oil Marketers Association
Virginia Petroleum Jobbers Association
Washington Petroleum Marketers Association
West Virginia Petroleum Marketers Association
Western Petroleum Marketers Association
Wyoming Petroleum Marketers Association

Petitioner, the Jobbers' Group, intervenor below, is a non-profit association consisting of more than 3,000 independent marketers and jobbers of petroleum products in 49 states.

Petitioner, the Independent Gasoline Retailers, intervenor below, consists of the following:

Luther Griffin, t/a Palmer Highway Exxon, an independent Exxon brand gasoline station at 7106 George Palmer Highway, Landover, MD 20785 — not incorporated. Luther Griffin is sole owner.

Edward McGovern, t/a Maple Avenue Exxon, an independent Exxon brand gasoline station at 596 Maple Avenue, Ridgewood, NJ 07450. Incorporated — Mrs. Edward McGovern — President; Kevin McGovern — Vice President; Randy Mayl — Secy/Tres.

Anthony Monaco, t/a Milltown Exxon Servicenter, Inc., an independent Exxon brand gasoline station at North Main and John Streets, Milltown, NJ 08850. Incorporated Anthony Monaco — President; Helen Monaco — Vice President, Secy/Tres.

Donald E. Skilling, t/a Edon Service Corp. is an independent Chevron brand gasoline station at 105 Tiburon Blvd., Mill Valley, CA 94941. Incorporated — Donald Skilling — President; Mrs. Donald Skilling — Secretary.

Rex Shipley t/a Shipley's Standard Service and independent Standard brand gasoline station at 16343 Schoolcraft, Detroit, MI 48227. Not incorporated. Rex Shipley is sole owner.

*Respondents:*

| | |
|---|---|
| United States of America | (Plaintiff below) |
| Exxon Corporation | (Defendant below) |
| American Independent Refiners Association | (Intervenor below) |
| Ashland Oil, Inc. | (Intervenor below) |
| Champlin Petroleum Company | (Intervenor below) |
| Gladieux Refinery, Inc. | (Intervenor below) |
| Marathon Petroleum Company | (Intervenor below) |
| Mobil Oil Corporation | (Intervenor below) |
| Murphy Oil Corporation | (Intervenor below) |
| National Freight, Inc. | (Intervenor below) |
| Pennzoil Company | (Intervenor below) |
| Philadelphia Electric Company | (Intervenor below) |
| RJG Cab, Inc. | (Intervenor below) |
| Geraldine H. Sweeney | (Intervenor below) |
| Tenneco Oil Company | (Intervenor below) |
| Texas City Refining, Inc. | (Intervenor below) |
| Tosco Corporation | (Intervenor below) |
| U.S. Oil and Refining Company | (Intervenor below) |

| | |
|---|---|
| State of Alabama | (Intervenor below) |
| State of Arkansas | (Intervenor below) |
| State of California | (Intervenor below) |
| State of Connecticut | (Intervenor below) |
| State of Delaware | (Intervenor below) |
| State of Hawaii | (Intervenor below) |
| State of Idaho | (Intervenor below) |
| State of Illinois | (Intervenor below) |
| State of Indiana | (Intervenor below) |
| State of Iowa | (Intervenor below) |
| State of Kansas | (Intervenor below) |
| State of Louisiana | (Intervenor below) |
| State of Maryland | (Intervenor below) |
| State of Michigan | (Intervenor below) |
| State of Mississippi | (Intervenor below) |
| State of Montana | (Intervenor below) |
| State of Nevada | (Intervenor below) |
| State of North Dakota | (Intervenor below) |
| State of Ohio | (Intervenor below) |
| State of Oregon | (Intervenor below) |
| State of Pennsylvania | (Intervenor below) |
| State of Rhode Island | (Intervenor below) |
| State of Texas | (Intervenor below) |
| State of Vermont | (Intervenor below) |
| State of West Virginia | (Intervenor below) |
| State of Wisconsin | (Intervenor below) |
| State of Wyoming | (Intervenor below) |
| Territory of Guam | (Intervenor below) |
| Territory of the U.S. Virgin Islands | (Intervenor below) |

## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| PARTIES TO THE PROCEEDINGS | ii |
| PETITION FOR WRIT OF CERTIORARI | 1 |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 2 |
| STATEMENT OF THE CASE AND PROCEEDINGS BELOW | 3 |
| REASONS FOR GRANTING THE WRIT | 7 |
| 1. THE DECISION BELOW CONFLICTS WITH EXPLICIT CONGRESSIONAL INTENT, WITH FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS, WITH PROCEDURES INHERENT IN THE COMPENSATORY PURPOSE OF THE REMEDY OF RESTITUTION AND WITH THE PURPOSE OF INTERVENTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a) | 7 |
| A. Restitution Compensates Those Injured By Wrongful Conduct From The Benefit Conferred Upon The Wrongdoer; An Essential Aspect of This Principle Is The Right Of The Injured Party To Be Heard On The Nature And Amount Of His Injury And The Design Of A Remedy Therefor | 7 |

Page

B. The Decision Below Denied These Petitioner-Intervenors All Right To Litigate Their Claims of Injury On The Merits, Thus Depriving Them Of Any Opportunity For Hearing On Matters In Which They Have A Financial Interest, In Violation Of Due Process And F.R.C.P. 24(a) and 56(c) ..... 18

2. THE DECISION BELOW CONFLICTS WITH THE COMPENSATORY PURPOSE OF RESTITUTION AND THE PRINCIPLE OF PARTICIPATION BY CLAIMANTS IN RESTITUTIONARY PROCEEDINGS ARTICULATED IN PRIOR DECISIONS OF THIS COURT, AND OF THE TEMPORARY EMERGENCY COURT OF APPEALS ..... 23

3. THE DECISION BELOW AUTHORIZES AN UNLIMITED DISCRETION TO TRIAL JUDGES FORMULATING A "RESTITUTIONARY" REMEDY AND THEREBY PORTENDS INCREASED LITIGATION ... 26

CONCLUSION ..... 29

## TABLE OF CONTENTS OF APPENDIX

Page

APPENDIX A

Opinion and Judgment of the Temporary Emergency Court of Appeals of the United States in *United States v. Exxon Corp.*, Nos. DC-91 through DC-100 (Consolidated) (TECA, July 1, 1985)

Majority Opinion ..... A-1

Dissenting Opinion ..... A-100

APPENDIX B

Order of the Temporary Emergency Court of Appeals of the United States Denying Petition for Rehearing (August 15, 1985) ..... A-187

Order of the Temporary Emergency Court of Appeals of the United States (June 27, 1985) . A-189

APPENDIX C

Opinion and Judgment of the United States District Court for the District of Columbia in *United States v. Exxon Corp.*, 561 F.Supp. 816 (D. D.C. 1983) ..... A-191

APPENDIX D

Order of the United States District Court for the District of Columbia (February 5, 1981) ..... A-286

Order of the United States District Court for the District of Columbia (December 15, 1982) .... A-288

Order of the United States District Court for the District of Columbia (February 3, 1983) ..... A-289

Order of the United States District Court for the District of Columbia (April 11, 1983) ..... A-290

TABLE OF CONTENTS OF APPENDIX

Page

Memorandum and Order Granting Intervention (April 29, 1983) ..... A-291

Order of the United States District Court for the District of Columbia (July 6, 1983) ..... A-298

APPENDIX E

Constitutional Provision: Fifth Amendment ..... A-299

APPENDIX F

Economic Stabilization Act Amendments of 1971, Pub.L. 92-210, 85 Stat. 743, 12 U.S.C. Section 1904 note (1976) ..... A-300

Emergency Petroleum Allocation Act of 1973, Pub.L. 93-159, 87 Stat. 627 (1973) ..... A-307

Warner Amendment, Section 155 of Pub.L. 97-377, 96 Stat. 1830 (1982) ..... A-316

APPENDIX G

Report of the Office of Hearings and Appeals to the United States District Court for the District of Kansas in re Department of Energy, Stripper Well Exemption Litigation, 578 F.Supp. 586 (D.Kan. 1983) ..... A-320

## TABLE OF AUTHORITIES

### Cases


| | Page |
|---|---|
| *American Textile Manufacturers Institute, Inc. v. Donovan,* 452 U.S. 490, 101 S.Ct. 2478, 69 L.Ed.2d 185 (1981) | 14 |
| *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 66 S.Ct. 574, 90 L.Ed. 652 (1946) | 26 |
| *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975) | 9 |
| *Brockett v. Spokane Arcades, Inc.,* ____ U.S. ____, 53 USLW 4793 (1985) | 5 |
| *Cannon v. Univ. of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) | 9 |
| *Cascade Natural Gas Corp. v. El Paso Natural Gas Company,* 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967) | 19 |
| *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* ____ U.S. ____, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) | 9, 10 |
| *Cities Service Company v. Department of Energy,* 715 F.2d 572 (TECA 1983) | 17 |
| *Citronelle-Mobile Gathering, Inc. v. Edwards,* 669 F.2d 717 (TECA 1982), *cert. denied,* 459 U.S. 877, 103 S.Ct. 172, 74 L.Ed.2d 141 (1982) | 8, 13, 23, 24, 25, 26 |
| *Cleveland Board of Education v. Loudermill,* ____ U.S. ____, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) | 17 |
| *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) | 14 |
| *Department of Energy v. Hunt,* 734 F.2d 816 (TECA 1984) | 10 |

## Table Of Authorities

### Cases

Page

*DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321 (TECA 1974), *cert. denied*, 419 U.S. 896, 95 S.Ct. 176, 42 L.Ed.2d 141 (1974) ..... 9

*Federal Power Commission v. Interstate Natural Gas Company*, 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1949) ..... 15, 16, 23, 24, 26

*First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778-79, n.14, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978) ..... 16

*French v. Gapen*, 105 U.S. 509, 26 L.Ed. 951 (1882) ..... 19, 20

*Getty Oil Co. v. Department of Energy*, 749 F.2d 734 (TECA 1984) .....

*Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) ..... 17

*Grosjean v. American Press Co.*, 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936) ..... 16

*In Re Department of Energy Stripper Well Exemption Litigation*, 578 F.Supp. 586 (D. Kan. 1983) ..... 5, 10, 14, 21, 27

*International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977) ..... 14

*Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983) ... 22

*Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948) ..... 21

*Logan v. Zimmerman Brush Company*, 455 U.S. 422, 102 S.Ct. 1148, 71 L.Ed.2d 265 (1982) .... 16, 17

## Table Of Authorities

### Cases

Page

*Maryland Casualty Co. v. Glassell-Taylor & Robinson,* 156 F.2d 519 (5th Cir. 1946) ..... 16

*Maryland Casualty Co. v. Santer,* 344 F.Supp. 433 (N.D. Miss. 1972) ..... 25

*Matthews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) ..... 17

*Midwest Petroleum Company v. United States Department of Energy,* 760 F.2d 287 (TECA 1985) ..... 17

*Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) 16

*New Orleans Public Service, Inc. v. United Gas Pipe Line Co.,* 732 F.2d 452 (5th Cir. 1984) ..... 19

*Norman's On The Waterfront, Inc. v. Wheatley,* 444 F.2d 1011 (3rd Cir. 1971) ..... 19

*Pan American Fire & Casualty Co. v. Revere,* 188 F.Supp. 474 (D.C. La. 1960) ..... 16

*Park & Tilford, Inc. v. Schulte,* 160 F.2d 984 (2d Cir. 1947), *cert. denied,* 322 U.S. 761, 68 S.Ct. 64, 92 L.Ed. 347 (1947) ..... 19

*Payne 22, Inc. v. United States,* 762 F.2d 91 (TECA 1985) ..... 17

*Poller v. Columbia Broadcasting System,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962) ..... 21

*Porter v. Warner Holding Company,* 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946) ..... 12, 13, 15, 23, 24, 27

*Rector v. United States,* 20 F.2d 845 (8th Cir. 1927) ..... 19, 20

## TABLE OF AUTHORITIES

### CASES


| | Page |
|---|---|
| *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944) | 21 |
| *Sauder v. Department of Energy*, 648 F.2d 1341 (TECA 1981) | 8, 13, 23 |
| *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943) | 5 |
| *Skelly Oil Co.*, 3 FEA ¶80,603 (1976) | 10 |
| *Southern Mutual Help Ass'n., Inc. v. Califano*, 574 F.2d 518 (D.C. Cir. 1977) | 5 |
| *Spangler v. United States*, 415 F.2d 1242 (9th Cir. 1969) | 19 |
| *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101 (1944) | 5 |
| *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931) | 22 |
| *S.O.S. Gasoline Enterprises v. DOE*, 4 Energy Management (CCH) 56,321 (D.C. 1981) | 22, 23 |
| *Tully v. Mobil Oil Corp.*, 455 U.S. 245, 102 S.Ct. 1047, 71 L.Ed.2d 120 (1982) | 28 |
| *United States of America v. Pro Football, Inc.*, 514 F.2d 1396 (TECA 1975) | 9 |
| *United States v. Morgan (Morgan II)*, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939) | 24, 26 |
| *United States v. Ringer & Ringer Enterprises*, 492 F.Supp. 350 (D. Colo. 1980), *appeal dismissed*, No. 10-34 (TECA May 12, 1981) | 8 |

## TABLE OF AUTHORITIES

### CASES

Page

*University of Southern California v. Cost of Living Council,* 472 F.2d 1065 (TECA 1972), *cert. denied,* 410 U.S. 928, 93 S.Ct. 1364, 35 L.Ed.2d 590 (1973) ..... 9

*United States v. Lieb,* 333 F.Supp. 424 (W.D. Tex. 1971), *aff'd* 462 F.2d 1161 (TECA 1972) .....5, 7, 10

*Wade v. Goldschmidt,* 673 F.2d 182 (7th Cir. 1982) 19

*Warth v. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975) ..... 16

### Constitution

United States Constitution, Fifth Amendment ... 2

### Statutes

Department of Energy Organization Act, Pub.L. No. 95-91, 91 Stat. 565 (1977) ..... 9

Economic Stabilization Act of 1970, Pub.L. No. 91-379, 84 Stat. 796 ..... 2

Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743, Sections 209-211 ..... i, 2, 3, 4, 5, 7, 9, 12, 24, 26

Emergency Petroleum Allocation Act of 1973, Pub.L. No. 93-159, 87 Stat. 627, Section 5 .... 2, 3

*Energy Conservation and Production Act,* Pub. L. 94-385, 90 Stat. 1192 (1976) ..... 9

*Energy Policy and Production Act,* Pub. L. 94-163, 89 Stat. 871 (1975) ..... 9

TABLE OF AUTHORITIES

Page

Federal Energy Administration Act of 1974, Pub.L. No. 93-275, 88 Stat. 96 ..... 9

Warner Amendment, Section 155 of Pub.L. No. 97-337, 96 Stat. 1830 (1982) .....3, 4, 11, 12

**Rules and Regulations**

Federal Rules of Civil Procedure
Rule 24 ..... i, 4, 7, 18, 19
Rule 56 ..... i, 6, 18, 21

40 Federal Register 40142 (September 2, 1975) . 10

44 Federal Register 7922 (February 7, 1979).... 9

Rules of the United States Supreme Court
Rule 21.1(b) ..... ii
Rule 28.1 ..... ii

**Other Authorities**

Annual Reports of the Administrative Office of the United States Courts, Table B-2; 1980-1984 ... 28

3B Moore's, Federal Practice (2d Edition) Paragraphs 24.07, 24.09, and 24.16 .....

7A Wright & Miller, Federal Practice and Procedure, Sec. 1922, pp. 623 at 625 ..... 20

128 Congressional Record H10435 (Daily ed. Dec. 20, 1982) (Statement of Hon. John Dingell, spokesman for the Amendment in the House and Chairman of the House Committee on Energy and Commerce) ..... 12

128 Congressional Record S15116, S15117, S15118 and S15126 (Daily ed. Dec. 16, 1982) (Statement of Senator John Warner) ..... 11

No.

# In The Supreme Court

OF THE

# United States

OCTOBER TERM, 1985

AIR TRANSPORT ASSOCIATION OF AMERICA
PETROLEUM MARKETERS ASSOCIATION OF AMERICA
THE JOBBERS' GROUP
INDEPENDENT GASOLINE RETAILERS
*Intervenors-Petitioners,*

vs.

EXXON CORPORATION,
*Defendant-Respondent,*
and
UNITED STATES OF AMERICA,
*Plaintiff-Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Petitioners pray that a Writ of Certiorari issue to review the remedy portions of the judgment of the Temporary Emergency Court of Appeals of the United States ("TECA") in its case nos. DC-91 through DC-100 entitled *United States of America v. Exxon Corporation.*

## OPINIONS BELOW

The majority opinion of the Temporary Emergency Court of Appeals of the United States ("TECA") and the related dissenting opinion are as yet unreported and appear in Appendix A.[1] The order of TECA denying rehearing appears in Appendix B. The opinion of the United States District Court for the District of Columbia is reported at 561 F.Supp. 816 (D. D.C. 1983) and appears in Appendix C.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1985. A timely petition for rehearing was denied on August 15, 1985. (App. B, at p. 187) This Court's jurisdiction is invoked under Section 211(g) of the Economic Stabilization Act of 1970 Pub.L. No. 91-379, 84 Stat. 796, as amended by the Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743, 748-50 (previously codified at 12 U.S.C. section 1904 note (1976)), which appears at Appendix F, page 305, and incorporated by reference in section 5(a)(1) of the Emergency Petroleum Allocation Act of 1973, Pub.L. No. 93-159, 87 Stat. 627, 633, which appears at Appendix F, page 315.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution is reprinted at Appendix E. The Economic Stabilization Act Amendments of 1971, Pub.L. No. 92-210, 85 Stat. 743, are reprinted at Appendix F, pages 300 through 306. The Emergency Petroleum Allocation Act of 1973, Pub.L.

---

[1]Appendices A through G are separately bound and filed concurrently herewith.

No. 93-159, 87 Stat. 627, Section 5 is reprinted at Appendix F, pages 307 through 315. The Warner Amendment, Section 155a of Pub.L. No. 97-277, 96 Stat. 1830 (1982) relied upon by the District Court, is reprinted at Appendix F, pages 316 through 319.

## STATEMENT OF THE CASE AND PROCEEDINGS BELOW

The petitioner's due process claims are best understood against the background of the proceedings below. In 1978, the United States brought an action against Exxon Corporation ("Exxon") under Section 209 of the Economic Stabilization Act ("ESA") as amended, 12 U.S.C. Section 1904 note (1971). The Government alleged that Exxon had overcharged its customers by selling as higher priced "new oil" what legally should have been sold as lower priced "old oil". (App. C, at p. 264) This was the largest enforcement action ever instituted by the Government.

In 1982 both the Government and Exxon filed cross motions for summary judgment. (App. C, at p. 192) The Government's motion went beyond liability, however, and sought summary judgment as to the remedy issue as well. The Government argued that restitution pursuant to Section 209 would be accomplished by payment of Exxon's overcharges directly into the U.S. Treasury. (App. C, at p. 267) The Government offered no evidence and asserted no facts on how this proposed remedy would best accomplish the statutory goals of restitution.

At this point in the litigation, various parties moved to intervene on the ground that they were directly harmed by Exxon's pricing violations. The District Court formally stayed ruling on these motions (App. D, at p. 288) and in March of 1983, the District Court went on to decide all liability issues in favor of the Government. (App. C, at p. 191) It precisely established the amount of Exxon's

violation, (App. C, at p. 283) which with accrued interest totals $2 billion. It also approved restitution under Section 209 as the appropriate remedy. (App. C, at pp. 256, 268) At the same time, and without seeking evidence nor conducting any hearing, the District Court declared that ascertaining any of the injured purchasers and measuring injury to such purchasers is impossible. (App. C, at pp. 267, 268) Thereupon, it fashioned its own remedy, ordering that refund of the overcharges, with interest, be disbursed to state governments to be expended by them on five programs specified in the "Warner Amendment," Section 155 of Pub. L. 97-377, 96 Stat. 1830 (1982). (App. C, at pp. 272-74) That unique enactment, declared by its sponsors to be non-precedential and to be limited to expending funds not required by the Government for the compensation of identifiable injured purchasers, directed its benefits for the immediate relief of indigent consumers of heating oil during that freezing winter. The District Court disregarded the limitations expressed in the Warner Amendment by Congress and made no attempt to identify individual injured purchasers nor to assess the injury any of them bore nor to make any refunds linked to energy purchases or use. (App. C, at pp. 272-74)

After issuing its memorandum opinion, but prior to entering final judgment, the District Court granted the motions of several purchasers of crude oil and refined petroleum products, including the petitioners, to intervene; the District Court specifically found that these petitioners were entitled to intervene as a matter of right under Federal Rule of Civil Procedure 24(a). (App. D, at pp. 293-98) However, the District Court limited their intervention solely to appeal of the remedy issue and precluded them from offering evidence as to their injury

or as to the design of a compensatory remedy. Final judgment was formally entered on June 7, 1983.[2]

A divided Court of Appeals affirmed the District Court in all respects, 2-1, holding that Judge Flannery had exercised permissible discretion in ordering refunds to the states, without making any effort to identify the injured parties. (App. A, at p. 99) The Court of Appeals asserted its conclusion that refunds to purchasers are impossible (App. B, at pp. 189-90), despite the fact that it had evidence before it which definitively showed that customers of large amounts of petroleum products can be identified, their purchases can be documented, and the refunds can be computed by means of reliable economic methods and analysis. This evidence is in the form of an extensive fact-finding Report of the Office of Hearings and Appeals ("OHA") of the Department of Energy ("DOE") commissioned by another federal District Court formulating a refund remedy for crude oil overcharges. *See In Re DOE Stripper Well Exemption Litigation,* 578 F. Supp. 586 (D.Kan. 1983). This OHA report, filed by TECA in the record herein, but ignored by the Majority opinion; it is reprinted in Appendix G.

In the instant case, this Court is presented with a constitutional violation: Did not the District Court's sum-

---

[2]The resolution of this petition does not require any specialized knowledge of the regulatory scheme regarding crude oil price controls. The issue before this Court involves only the meaning of restitution as initially implemented by the courts in *U.S. v. Lieb*, 333 F.Supp. 424 (W.D. Tex. 1971) and expressly included by Congress in Section 209 of the Economic Stabilization Act. *See* S. Rep. No. 92-507, 92nd Cong., 1st Sess., *reprinted* in [1971] U.S. Code Cong. & Ad. News 2283, 2291. That the DOE has amended its preferences recently in favor of payment of overcharges to the Treasury is not material to interpret this statutory term. Where an agency's interpretation does not rest on its special expertise but on principles of common law its interpretation is less potent than it would otherwise be and is *not* entitled to particular deference by the courts. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943). *So. Mutual Help Ass'n., Inc. v. Califano*, 574 F.2d 518, 526 (D.C. Cir. 1977).

mary disposition of remedy infringe upon the due process rights of intervenor purchasers who were injured by the price overcharges? These purchasers were freely admitted as parties of right before the District Court but then were prohibited from offering any evidence to that Court. It is, however, not necessary for the Court to reach the constitutional question,[3] for the District Court's judgment is also contrary to settled case law authorizing intervenors to litigate the merits of questions vital to protection of their interests. Alternatively, this court may rely upon the requirements of Federal Rule of Civil Procedure 56(c) that material factual issues not be disputed and that parties establish their entitlements as a matter of law if summary judgment is to be appropriate; neither condition was met hereinbelow.

---

[3]The Court's reluctance unnecessarily to decide constitutional questions was recently emphasized in *Brockett v. Spokane Arcades, Inc.*, ____ U.S. ____, 53 USLW 4793 (1985); *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944).

## REASONS FOR GRANTING THE WRIT

### 1. THE DECISION BELOW CONFLICTS WITH EXPLICIT CONGRESSIONAL INTENT, WITH FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS, WITH PROCEDURES INHERENT IN THE COMPENSATORY PURPOSE OF THE REMEDY OF RESTITUTION AND WITH THE PURPOSE OF INTERVENTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a).

#### A. Restitution Compensates Those Injured By Wrongful Conduct From The Benefit Conferred Upon The Wrongdoer; An Essential Aspect Of This Principle Is The Right Of The Injured Party To Be Heard On The Nature And Amount Of His Injury And The Design Of A Remedy Therefor.

Compensatory restitution under Section 209 of the ESA, that is, repayment to individual purchasers who have been victims of price overcharges, has been specifically endorsed by Congress. When Section 209 was initially enacted in 1970, it did not mention restitution but only authorized injunctive relief in enforcement cases brought by the Government. Subsequently, in *U.S. v. Lieb,* 333 F.Supp. 424 (W.D. Tex. 1971), a District Court held that it had equitable power to award refunds to individuals injured by violations of price controls and thereupon directed refunds to overcharged tenants. Almost immediately thereafter, in the course of considering extensive additions to the ESA, Congress added a final sentence enlarging the scope of relief available under Section 209 as follows:

> "In addition to such injunctive relief, the court may also order restitution of monies received in violation of any such order or regulation." Pub.L. No. 92-210, 85 Stat. 743, Section 209.

In Senate Report No. 92-507, the foregoing amendment was explained as follows:

> "In addition to injunctive relief, the court may also order restitution of monies received in violation of any regulation or order. It was not certain that, in these circumstances, there was an inherent equitable power in the court to set things right and order restitution. Restitution has been granted in several cases successfully prosecuted by the Government in Phase I (*United States vs. Lieb,* Civil Action No. SA 71 CA 267, D.C.W.D. Tex., Oct. 13, 1971). This provision makes clear that the court has power to grant restitution."[4]

TECA has several times construed this language to underscore that its purpose was to assure compensation to individual overcharged purchasers. In *Citronelle-Mobile Gathering, Inc. vs. Edwards,* 669 F.2d 717, 722 (TECA 1982), the Court held:

> "... In the exercise of these powers to remedy civil wrongs and restore civil rights, the authority is vested to make the victims whole, 'so far as possible, and restored to a position where they would have been had it not been for' the unlawful violation, such as was practiced here."[5]

Between 1972 and 1975, TECA approved refunds to individual injured purchasers in several actions decided

---

[4]S. Rep. No. 92-507, 92nd. Cong., 1st Sess., Reprinted in 2 [1971] U.S. Code Cong. & Admin. News 2283, 2291.

[5]Earlier, in *Sauder vs. Department of Energy,* 648 F.2d 1341, 1348 (TECA 1981), the Court of Appeals observed: "Equitable pricing is one of the important objectives of the Emergency Petroleum Allocation Act ... Congress has explicitly given the courts 'equitable power ... to set things right and to order restitution,' in instances of overcharging." See also *United States vs. Ringer,* 492 F.Supp. 350, 352 (D. Colo. 1980), appeal dismissed, No. 10-34 (TECA May 12, 1981) ("... restitution to the rightful owner: .. [T]he rightful owners of the overcharges are those who are overcharged.")

under Section 209. *United States of America v. Pro Football, Inc.*, 514 F.2d 1396 (TECA 1975); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, (TECA 1974) cert. denied, 419 U.S. 896, 95 S.Ct. 176 (TECA 1974); *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (TECA 1972), cert. denied, 410 U.S. 928, 93 S.Ct. 1364 (1973).

During and after this same period, Congress comprehensively re-examined federal petroleum price controls. *See* Federal Energy Administration Act of 1974, Pub. L. No. 93-275, 88 Stat. 96 (May 7, 1975); Energy Policy and Conservation Act, Pub. L. No. 94-163, 89 Stat. 871 (December 22, 1975); Energy Conservation and Production Act, Pub. L. 94-385, 90 Stat. 1142 (August 14, 1976); Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (August 4, 1977). Through its detailed review of enforcement procedures and proceedings, Congress could not help but have been aware of the consistency in TECA's above cited decisions implementing section 209. In each of these enactments, Congress made no change to the language of Section 209 and thus ratified both its 1971 amendment and TECA's continuing consistent implementation of refunds to individual overcharged purchasers.[6] Thus, Congress has spoken directly to the precise question at issue and approved of refunds to individual overcharged purchasers. As this Court observed, unanimously, in *Chevron U.S.A., Inc. vs. Natural*

---

[6]When Congress has re-examined in comprehensive fashion a regulatory program, making some revisions and not others, it has been held to have ratified its prior unchanged enactments and consis nt judicial construction thereof. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 732, 95 S.Ct. 1917, 44 L.Ed. 2d 539 (1975); *Cannon v. Univ. of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed. 2d 560 (1974).

Indeed, Congress called for purchasers and consumers to participate in enforcement (and thus in restitution) proceedings and to be heard before decisions were made by the DOE on such subjects. *See* DOE Organization Act, 42 U.S.C. 7112 (15); 44 Fed.Reg. 7922 at 7923 (Feb. 7, 1979).

*Resources Defense Council, Inc.*, ___ U.S. ___, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694, 52 U.S.L.W. 4845 (1984):

> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

The respect appropriately to be shown to the Congressional preference for refunds to individuals, as in *Lieb, supra,* would stimulate most courts to a meaningful effort to locate and compensate overcharged customers. So District Judge Their declared in the very similar *Stripper Well Litigation:*

> "The court believes, however, that an attempt *must* be made to determine if particular harm can be shown and that Judge Flannery's resolution in *Exxon* was premature. The court believes this approach is required by TECA in light of *Citronelle-Mobile Gathering Co. v. Edwards, supra.*"[7]

Several panels of TECA are in accord that an investigation involving injured purchasers as participants is appropriate. *See Department of Energy v. Hunt,* 734 F.2d 816 (TECA 1984) and *Getty Oil Co. v. Department of Energy,* 749 F.2d 734, 739 (TECA 1984).[8]

However, the District Court below undertook no factual inquiry but declared it impossible to locate *any* of the

---

[7] *In re DOE Stripper Well Exemption Litigation,* 578 F.Supp. 586, 595 (D. Kan. 1983).

[8] *See, e.g.,* 40 Fed.Reg. 40141, at 40142 (Sept. 2, 1975) ("The FEA intends, as it has in the past, to require by order whatever action is necessary on the part of offenders and downstream resellers to assure, to the extent possible, that refunds and rollbacks flow to those persons who are the victims of the overcharge"; *see also, Skelly Oil Co.,* 3 FEA ¶ 80,603 (1976).

injured customers or measure *any* part of their injury. (App. C, at p. 267). The trial judge dismissed the language of Section 209 as not limiting him to a single strict interpretation of restitution; without any effort at compensation for the injured, the District Court seized upon a substitute for restitution proposed neither by the United States nor by Exxon. (App. C, at pp. 271-72) Petitioners submit this course gave too little deference to Congressional intent.

In appropriating portions of the Warner Amendment[9] as its chosen remedial rationale, both the District Court and TECA have ignored the history and purpose of that unique enactment. Enacted in six days[10] just before Christmas 1982, the Warner Amendment was patently non-precedential in design being described by its author as "a one-time federal payment to the states,"[11] an "immediate disbursement of $200 million" to aid the indigent with their heating oil bills during "the frigid months of January and February."[12]

Congress never intended that particular distribution of funds be "restitutionary" to overcharged purchasers.

---

[9]Section 155 of Pub. L. No. 97-377, 96 Stat. 1830 at 1919-1920 (Dec. 21, 1982), authored by Sen. John Warner, an amendment unrelated to the joint resolution funding various executive departments and agencies to which it was attached.

[10]*See* Statement of Senator John Warner, 128 Cong. Rec. § 15118 (daily ed., Dec. 16, 1982).

[11]*Id.* at § 15116. In the House, Cong. Dingell noted: "The provision is a one-time provision. It should not be viewed as a precedent. . . . It is a very limited provision aimed at helping people. It is, I stress, an exclusive one-time disbursement authority." 128 Cong. Rec. H10435 (daily ed., Dec. 20, 1982).

[12]*Id.* at § 15114, 15117. The Warner Amendment rested upon no nexus between the pricing violations generating its funding and the distribution of that fund to the indigent. Thus, Sen. Bennett Johnston criticized the Amendment: "To say there is a necessary correlation between the percentage of refined petroleum products consumed and overcharges . . . is just not correct . . . . [It] is an assumption supported by nothing and built out of an air castle." 128 Cong. Rec. § 15126 (daily ed., Dec. 16, 1982).

Quite to the contrary, Congress required that *no* funds be distributed thereunder which could possibly be needed to satisfy claims by overcharged purchasers harmed by violations of DOE price controls.[13] That key restriction was expressly discarded by the District Court without explanation or supporting evidence. (App. C, at p. 272)

Further, the Warner Amendment restricted expenditures by states five federal programs principal benefit to the indigent, a limitation adopted by the District Court in the instant case. *See Exxon, supra*, at 856. (App. C, at pp. 272-74) None of these programs benefit petitioners nor remedy the overcharges whose impact was borne by these petitioners.

There is nothing inconsistent between refunds to injured consumers under Section 209 and the special distribution made by the Warner Amendment, for the Amendment itself excluded funds needed for restitution to indentifiable injured purchasers and provided a substitute for restitution only under circumstances where injured customers could not be identified. By disregarding this limitation in the Warner Amendment, the District Court and TECA have managed to approve a remedy that is neither restitutionary nor harmonious with the clearly expressed Congressional intent for Section 209.

Concomitant with the power of courts to order restitution is the duty of judges to make a bona fide effort to identify who has been injured as a result of statutory infractions and to try to compensate them for their injury. Thus, in *Porter vs. Warner Holding Company,* 328 U.S. 395, 402, 66 S.Ct. 1086, 1091, 90 L.Ed. 1332 (1946),

---

[13]*See* Warner Amendment Sections 155(a) and (e)(1), reprinted at App. F, at p. 316 and App. F, at p. 317. *See* 128 Cong. Rec. H 10435 (Daily Ed., Dec. 20, 1982) (Statement of Hon. John Dingell, Spokesman for the Amendment in the House and Chairman of the House Committee on Energy and Commerce).

confirming the availability of restitution to injured purchasers under World War II's Emergency Price Control Act of 1942, 50 U.S.C. § 925(a), this Court explained:

> "When the [Government] seeks restitution . . . , [it] asks the court to act in the public interest by restoring the status quo and ordering return of that which rightfully belongs to the purchaser or tenant."

Mindful of this compensatory purpose of restitution[14] and relying upon *Porter,* TECA correctly interpreted Section 209 in *Citronelle, supra,* in holding:

> "As determined by the District Court, the Government has demonstrated injury to a class of persons . . . , suffice it to note that the government has a *duty* to try to ascertain those overcharged, and refund them, with interest, from the restitution funds." 669 F.2d 717, at 723.

The Government's duty is not a futile exercise; it can be and has been accomplished in other proceedings. Such success is because these petitioners, along with other substantial purchasers of crude oil and petroleum products, are able to document their purchases.[15] Analytic

---

[14] *See Moore's Federal Practice,* Vol. 5, ¶ 38.24[2], quoted with approval in *Sauder v. Department of Energy,* 648 F.2d 1341, 1348 (TECA 1981); Restatement of the Law 2d, Restitution (Tentative Draft No. 1, April 5, 1983) at 7-8 (". . . [The rules of restitution] are distinctive in that they not only withhold or withdraw a gain that constitutes unjust enrichment, but also afford relief for persons deserving compensation. The case for relief is especially compelling when the element of gain on one side is matched by loss on the other, and both result from a single wrongful act.").

[15] These petitioners purchase massive volumes of petroleum products from refiners; for example, the federally-certificated commercial airlines represented herein by petitioner Air Transport Association of America are the principal purchasers and consumer end-users of kerosene-based jet fuel ("kerojet"), which represents 6 percent of the nation's average annual output of petroleum products. Each year these airlines, fewer than 60 in number during the term of petroleum price controls, purchased 10 billion gallons of kerojet, more than 80 percent of the nation's supply. Fourteen refiners, including Exxon, manufactured 96 percent of all U.S. kerojet during price

techniques exist and have been applied to determine the impact of crude oil overcharges; those methods reliably show the portion of crude oil overcharges absorbed at given levels of market distribution for given petroleum products. These very facts appear in the instant record in the form of a detailed factfinding report by the OHA submitted to the District Court in *In re Stripper Well Exemption Litigation, supra,* and made by TECA a part of the record herein. (App. B., at pp. 189-90) OHA has determined that crude oil refiners passed on to their customers, including these petitioners, the burden of crude oil overcharges of a kind and amount nearly identical to those herein.[16] Thus, OHA determined in part:

---

controls; they and the airlines maintained detailed, often computerized, records of fuel purchasees. During the term of these overcharges by Exxon, kerojet prices rose 600 percent. Airlines' total fuel expense in 1973 was $1.4 billion. By 1980 it was over $10.1 billion, having increased far more rapidly than the wellhead prices of crude oil. DOE price regulations generally required refiners to allocate their acquisition costs of crude oil volumetrically to product output in setting ceiling selling prices. This facilitates detection of the impact of overcharges upon airlines.

The very volume and concentration of airline purchases gave them, like other petitioners, sufficient economic incentives to seek to press their claims before the District Court. Part of their evidence is reflected in the OHA Report. If the District Court had elected to permit these purchaser-intervenors to present their evidence, one may anticipate that detailed analysis of the impact of Exxon's crude oil overcharges would have been accomplished. The OHA Report demonstrates the feasibility of executing a key portion of such an analysis: cost absorption and passthrough by refiners.

[16]OHA observed: "The [12,958-page] record compiled before the OHA indicates that by using marginal economic analysis, and focusing on the industry as a whole, it is possible to estimate indirectly the amount of crude oil price increases caused by the MDL 378 overcharges that were absorbed by refiners as a class, and the amount which they passed through to downstream purchasers in the form of higher product prices." The OHA's findings of injury are based upon the very type of economic analysis that is regularly employed by federal courts and agencies in complex cases. *International Brotherhood of Teamsters vs. United States,* 431 U.S. 3424, 339-40, 97 S.Ct. 1843, 1856 52 L.Ed. 2d 396 (1977); *American Textile Manufacturers Institute vs. Donovan,* 452 U.S. 490, 528-29, 101 S.Ct. 2478, 2500-01, 69 L.Ed. 2d 185 (1981); *Continental T.V., Inc. vs. GTE Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549. 53 L.Ed. 2d 568 (1977).

> ". . . [T]he record also permits findings about the impact on another class which was affected by the overcharges: consumers of petroleum products who purchased directly from the refiner. This class includes *airlines*, public utilities, the federal government, and *other large purchasers* that use petroleum products in their businesses. The finding in this report that the class of refiners absorbed between 2.7 and 8.1 [percent] of the impact on them of the MDL-378 overcharges means that the class of refiners passed through between 91.9 and 97.3 percent of that impact to the class of consumers that purchased refined petroleum products directly from refiners."

Evidence of the incidence of injury to purchasers of exactly the sort described by OHA in its Report, is wholly lacking in the District Court and TECA opinions below; to obtain such evidence is the very purpose for participation in restitution proceedings by persons with competing claims to refunds of overcharges.[17] In a similar vein, this Court observed in *FPC vs. Interstate Natural Gas Company:*

> "The aim of the act was to protect the ultimate consumers of natural gas from excessive charges . . . . They were the intended beneficiaries of rate reductions ordered by the Federal Commission . . . .
>
> When a federal court of equity grants relief by way of injunction, it has a responsibility to protect all the interests whom its injunctions may affect . . . . It assumes the duty to make dispostion of the fund in

---

[17]For this reason, this Court held in *Porter vs. Warner Holding Company*, 328 U.S. 395, 403, 66 S.Ct. 1086, 1091 (1946): "Should the [District] court decide to issue a restitution order and should there appear to be conflicting claims and counterclaims . . . , the court has inherent power to bring in all the interested parties and settle the controversies . . . ."

accord with equitable principles." 336 U.S. 577, 581, 582, 69 S.Ct. 775, 778 (1949).[18]

In essence, the distribution of the fund is similar to an action in interpleader and a trial court must protect all of the competing claimants by affording each an opportunity to give his evidence and be heard. *See, e.g., Maryland Casualty Co. vs. Glasell Taylor & Robinson,* 156 F.2d 519, 523-24 (5th Cir. 1946); *Pan American Fire & Casualty vs. Revere,* 188 F.Supp. 474 (D.C. La. 1960). Thus, these petitioning purchasers experienced that "distinct and palpable injury"[19] which ought customarily to elicit a judicial willingness to hear them.

This Court has previously decided that the right of access to the courts to defend financial interests is a property right protected by the Due Process clause of the Fifth Amendment. In *Logan vs. Zimmerman Brush Co.,* 455 U.S. 422, 102 S.Ct. 148, 71 L.Ed. 2d 265 (1982), this court approved Justice Jackson's declaration in *Mullane vs. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950), that the Due Process Clause "at a minimum require(s) the deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." In *Logan,* this Court noted the two-part inquiry of determining whether a party has been deprived of a

---

[18]The injured purchasers represented by these petitioners include many corporations and other business entities. It should no longer be open to question that due process rights in pursuit of financial property interests are protected for these "artificial persons" by the prior decisions of this Court. Whatever the outer contours of such protection, at a minimum, these entities are entitled to the same rights to notice and an opportunity for hearing before deprivation of their property by adjudication as any "natural person." *See, e.g., First National Bank of Boston vs. Bellotti,* 435 U.S. 765, 778-79, n. 14 (1978) and cases cited therein; *see also Grossjean vs. American Press Co.,* 297 U.S. 233, 244, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

[19]*Warth vs. Seldin,* 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed. 2d 343 (1975).

protectable interest and then what process was due to that party. The District Court correctly determined that these petitioners, intervenors below, had a legally protectable interest, a property right, when it admitted them "as of right" to the litigation pursuant to Federal Rule of Civil Procedure 24(a).

The second *Logan* inquiry is not difficult: This Court has consistently held that *some* form of hearing is required before an individual or other litigant may be deprived of a property interest. *Matthews vs. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed. 2d 18 (1976); *Goldberg vs. Kelly,* 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970); *Cleveland Board of Education vs. Laudermill,* ____ U.S. ____, 105 S.Ct. 1487, 84 L.Ed. 2d 494 (1985). As this Court observed in *Eldridge, supra:*

> "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' [citations omitted]." 424 U.S. at 333, 96 S.Ct. at 902.

In the instant case, *no* hearing whatever, *no* opportunity to present evidence or argument nor to aid the District Court in designing the compensatory restitutionary remedy was ever afforded by the District Court. Without notice, the District Court decided remedy issues concurrent with liability, all upon summary judgment.

The Court of Appeals below excused the District Court based on several inapposite decisions of TECA concerning the authority of third persons to challenge consent orders and settlements entered into between the DOE and alleged violators of petroleum price regulations. *See Payne 22, Inc. vs. United States,* 762 F.2d 91 (TECA 1985); *Midwest Petroleum Company vs. DOE,* 760 F.2d 287 (TECA 1985); *Cities Service Company vs. DOE,* 715 F.2d 572 (TECA 1983). Those cases differ from the

instant case in that they involve voluntary settlements in which no violations were actually adjudged; neither was the amount of any violation found. In the instant case, Exxon has been ruled to be a violator; both the manner and precise dollar amount of its violations have been determined by the District Court and affirmed.

A second difference is that the cases cited by TECA all involved litigants who possessed a clear-cut, separate private right of action against the alleged violator under Section 210 of the ESA. That section affords to *direct* purchasers a right to single and treble damages for compensation of overcharges. Thereby having a separate right of action, whatever compensation such third parties failed to receive from Government settlements, they were free to prosecute themselves. These petitioners are *indirect* purchasers who have *no* Section 210 damage remedy available to them, yet who bore the impact of the crude oil overcharges by Exxon. The *only* meaningful time and meaningful manner in which indirect purchasers like these petitioners may be heard is in the design of a compensatory restitutionary remedy under Section 209. By prohibiting their participation in any effective manner, the District Court, and the Majority opinion in TECA have denied these petitioners due process of law, as is protested in the lengthy and forceful Dissent below. (App. A, at pp. 100-186)

### B. The Decision Below Denied These Petitioner-Intervenors All Right To Litigate Their Claims Of Injury On The Merits, Thus Depriving Them Of Any Opportunity For Hearing On Matters In Which They Have A Financial Interest, In Violation Of Due Process And F.R.C.P. 24(a) And 56(c)

The District Court granted intervention as of right to these petitioners, as well as to other purchasers of petroleum products, under Rule 24 (a) of the Federal Rules of

Civil Procedure. This finding necessarily includes the determination that the interest of these petitioner-intervenors is direct and substantial and not adequately protected by the presence of other parties[20] already before the Court. F.R.C.P. 24(a).[21]

The right of an intervenor to present evidence on his own claims and so to conduct himself as to protect his interest in litigation has regularly been recognized by this Court.[22] Indeed, this Court has approved full participation by intervenors to reach the proper resolution in matters of energy regulation and has relied upon the evidence presented by intervenors to that end. *See Cascade Natural Gas Corp. vs. El Paso Natural Gas Company,* 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed. 2d 560 (1967).[23]

Any contrary result would deprive intervention of all significance: It would be meaningless to afford a person the status of "intervenor as of right" and then deny him every opportunity to protect the very interest that otherwise risks infringement during litigation. *Spangler vs. Pasadena Board of Education,* 415 F.2d 1242, 1245 (9th Cir. 1969). This is especially the case where an individual

---

[20]The United States claimed to be seeking restitution, in its Complaint, but requested that the entire overcharge amount be paid to the United States Treasury, with no effort being made to compensate individual injured purchasers. Exxon sought to avoid rendering compensation to any persons.

[21]The interest necessary for intervention must be a legally protectable interest. *Wade vs. Goldschmidt,* 673 F.2d 182, 185 (7th Cir. 1982); *New Orleans Public Service, Inc. vs. United Gas Pipeline Co.,* 732 F.2d 452, 464 (5th Cir. 1984). As described in the preceding section, a prohibition against litigating one's claim to a fund in restitution, after incurring injury due a wrongdoer's statutory violation or in the analogous action of interpleader, is a protectable interest.

[22]*See, e.g., French vs. Gapen,* 105 U.S. 509, 525, 26 L.Ed. 951 (1881).

[23]*Accord: Norman's on the Waterfront, Inc. vs. Wheatley,* 444 F.2d 1011 (3d Cir. 1971); *Park & Tilford Inc. v. Schulte,* 160 F.2d 984, 989, n.1 (2d Cir. 1947) *cert. denied* 322 U.S. 761, 68 S.Ct. 64, 92 L.Ed. 347 (1947); *Rector vs. United States,* 20 F.2d 845, 859 (8th Cir. 1927). Consistent with these principles is the rule that an intervenor may appeal all orders that affect him.

seeks to claim a portion of a given fund and must litigate against competing complainants seeking distributions of their own from the same monies. *See French vs. Gapen, supra; Rector vs. United States, supra.*

Early in this litigation, Exxon petitioned for interpleader of purchasers of the overpriced oil; in February 1981, the District Court responded by deferring any consideration of remedy until after resolution of liability. (App. D, at pp. 286-87) Following the filing of motions for summary judgment by Exxon and the Government, various independent refiners moved to intervene, but the District Court granted Exxon's motion for stay of their intervention "until further order of this Court." (App. D, at p. 288) When one of these petitioners, the Independent Gasoline Retailers, moved to intervene January 20, 1983, once again Exxon's motion to stay this motion was granted. (App. D, at p. 289) Barely two months later, while potential intervenors still awaited all opportunity to address remedy, the District Court issued its decision denying intervention and also declaring the amount of Exxon's overcharges and ordering that refunds of the same be distributed to state governments.[24]

Thereafter, the District Court reconsidered its denial of intervention on April 11, 1983 (App. D, at p. 290) and subsequently granted new motions of various parties, including these petitioners, pursuant to F.R.C.P. 24(a). (App. D, at pp. 291-98) However, the Court limited such intervention *solely* to appeal the remedy determination and took no evidence on remedy, formally entering judgment on June 7, 1983.[25] By affirming the District Court,

---

[24]App. C, at pp. 276-85.

[25]Although there is divided authority on the power of courts to condition intervention in order to accommodate efficient prosecution of litigation, there is no authority to nullify the intervention by prohibiting intervenors from presenting any evidence or argument on issues affecting them. *See* 7A *Wright*

the Court of Appeals below has stripped intervention of any meaning, deprived these petitioners any opportunity for hearing, and thereby led to their deprivation of due process rights.

It must also be noted that the District Court decided liability and remedy questions on a motion for summary judgment. The Court of Appeals affirmed, notwithstanding the arguments of intervenors appealing the remedy and also notwithstanding the evidence of the OHA Report filed with TECA. Although the District Court declared without proof it is impossible to identify any injured purchasers or to ascertain any part of their injury, the OHA Report expertly refutes this, demonstrating at least some purchasers can be appropriately compensated for at least some of the injury they bore from unlawful overcharges.[26]

The District Court has thus rendered a decision incorrect as a matter of law under Federal Rule of Civil Procedure 56(c): The OHA Report in this record shows that material triable facts remain in dispute. Further, the prevailing party failed to present any competent facts sufficient to warrant the judgment in its favor that identifying *any* overcharged purchaser or his injury was wholly impossible. *See Poller vs. Columbia Broadcasting System,* 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 458 (1962); *Sartor vs. Arkansas Natural Gas Corp.,* 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967 (1944); (App. A, at pp. 153-60). As District Judge Theis observed in *Stripper Well Litigation,* at the

---

*& Miller, Federal Practice and Procedure* § 1922, 623 at 625 and cases cited therein.

[26]The failure of the District Court to take evidence while still issuing summary judgment underscores the wisdom expressed by this Court in *Kennedy vs. Silas Mason Co.,* 334 U.S. 249, 256-57, 68 S.Ct. 1031, 1034 (1948), cautioning that " . . . summary procedures, however salutory where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import . . ."

same juncture in that action at which District Judge Flannery made his finding of impossibility herein:

> "The court would note that it has before it no facts at this time which could establish that it is impossible to identify at least some of the injuries caused by the overcharges. For the court to conclude that impossibility exists at this time would be too hurried retreat from the objective of restitution to most nearly restore the status quo and return to those overcharged the amount of their loss." 578 F.Supp. 595 (D.Kan. 1983).

Summary judgment was also incorrect as a matter of law by reason of the application of an unduly rigorous standard of precision to assess the determination of injury suffered by individual purchasers. The Majority in the Court of Appeals approved the District Court's conclusion that it was impossible to determine the "precise injury" suffered by each claimant, notwithstanding that Exxon's violations had been determined and the exact total dollar amount of those violations clearly found. (App. A, at pp. 98-100; App. C, at p. 276) Unquestionably, the DOE's complex price regulations made it difficult to trace costs downstream from crude oil producers to indirect purchasers and ultimate consumers. However, the task before the Court was restitution; even the law of damages, with requirements more exacting than those pertaining to equitable restitution, recognizes the necessity for making approximations in cases that do not easily lend themselves to precise calculation. *See Jones & Laughlin Steel Corp. vs. Pfeifer,* 462 U.S. 523, 103 S.Ct. 2541, 2555, 76 L.Ed. 2d 768 (1983). The risk of uncertainty must be resolved under the circumstances in the best way possible, for restitution is never an exact science. *Story Parchment Co. vs. Paterson Parchment Paper Co.,* 282 U.S. 555, 51 S.Ct. 248, 75 L.Ed. 544 (1931); *S.O.S. Gasoline*

*Enterprises vs. DOE,* 4 Energy Management (CCH) 56,321 (D.D.C. 1981).[27] Since the Majority affirmed the District Court based upon the application of an inappropriate legal standard, then *a fortiori* the movant was not entitled to summary judgment as a matter of law.

## 2. THE DECISION BELOW CONFLICTS WITH THE COMPENSATORY PURPOSE OF RESTITUTION AND THE PRINCIPLE OF PARTICIPATION BY CLAIMANTS IN RESTITUTIONARY PROCEEDINGS ARTICULATED IN THE PRIOR DECISIONS OF THIS COURT, AND OF THE TEMPORARY EMERGENCY COURT OF APPEALS.

Several times this Court emphasized the breadth of judicial power in ordering restitution and the concomitant duty to afford to all claimants an examination of their alleged individual injury. Thus, in *Porter vs. Warner Holding Company,* 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), this Court affirmed the broad power of restitution of unlawfully excessive prices:

> "[A federal court] may act so as to adjust and reconcile computing claims and so as to accord full justice to all the real parties in interest; if necessary, persons not originally connected with the litigation may be brought before the Court so that the rights and the subject matter may be determined and enforced. In addition, the Court may go beyond the matters immediately underlying its equitable juris-

---

[27]The task for a court considering restitution was well specified by Justice Frankfurter in his concurrence in *Federal Power Commission vs. Interstate Natural Gas Co.*: "... [To] reconstruct *as far as it possibly can be done* what would have happened had no fund accrued." 336 U.S. 577, 586, 69 S.Ct. 775, 780 (1949). The essential function for restitution is "to make the victims whole, *so far as possible,* and restored to a position where they would have been had it not been for the unlawful violations." *Citronelle-Mobile Gathering, Inc. vs. Edwards,* 559 F.2d 717, 722 (TECA 1982).

diction and decide whatever other issues and give whatever relief may be necessary under the circumstances. Only in that way can equity do complete rather than truncated justice. [citations omitted]" 328 U.S. at 398, 66 S.Ct. at 1089.[28]

Likewise, in *Federal Power Commission vs. Interstate Natural Gas Company,* 336 U.S. 577, 69 S.Ct. 775, 93 L.Ed. 895 (1940), this Court ordered that restitution be made to ultimate consumers and indirect purchasers, rather than being confined less equitably to the direct purchasing pipeline companies that claimed the available fund.[29]

The Court of Appeals' decision below profoundly contradicts its earlier opinion in *Citronelle-Mobile Gathering, Inc. vs. Edwards,* 669 F.2d 717, cert. denied 459 U.S. 877, 103 S.Ct. 172 (1982). In that action, under Section 209, the Court had identified the Government's duty to try to ascertain those overcharged and refund to them, with interest, the amounts due from restitutionary funds. The compensatory purpose of restitution was stressed so that victims would be restored to positions they would have occupied but for the unlawful violation. 669 F.2d at 722. The Court of Appeals specifically held that payment to

---

[28] I *Pomeroy, Equity Jurisprudence* § 114 at 152-153 (5th Ed. 1941); *See also Commonwealth Trust Co. vs. Smith,* 266 U.S. 152, 45 S.Ct. 26, 69 L.Ed. 219 (1924): "The governing motive of equity in the administration of its remedial system is to grant full relief, and to adjust in one suit the rights and duties of all parties, which really grow out of or are connected with the subject matter of that suit. Its fundamental principle concerning parties is, that all persons in whose favor or against whom there might be a recovery, however partial, and also all persons who are so interested, although indirectly, in the subject matter and relief granted, that their rights and duties might be affected by the decree . . . shall be made parties to this suit."

[29] *See also United States vs. Morgan (Morgan II),* 307 U.S. 183, 193, 59 S.Ct. 795, 800, 83 L.Ed. 1211 (1939). In the Court of Appeals, the dissent correctly observes the relevance of these decisions, while a Majority makes no mention of them nor otherwise imposes any standards for a trial judge to observe in formulating a remedy under Section 209 of the ESA.

the Federal Treasury was not restitution in any meaningful sense and required the Government to undertake an effort to make refunds to individual injured purchasers. *Citronelle*, as we have noted above, fully accorded with the prior decisions of TECA,[30] ordering restitution to individual victims of price overcharges.[31]

The Majority opinion in the Court of Appeals below attempts to distinguish *Citronelle*, first claiming the effect of DOE's Entitlements Program, a regulation adopted subsequent to the violations in question in *Citronelle*, had diffused crude oil overcharges and made them indistinguishable. Although the Entitlements Program complicates analysis, the factfinding Report by OHA, which was before the Court of Appeals at the time of its decision below, demonstrates it is possible to identify injured purchasers who bore the impact of crude oil overcharges, *notwithstanding* the effects of the Entitlements Program. Although the Dissent cited the OHA Report several times, the Majority below disregarded it.

The Majority also appears to have misunderstood an element of TECA's holding in *Citronelle*. There TECA commented that restitution intends to force disgorgement by a wrongdoer of amounts by which that wrongdoer has been unjustly enriched. To that end, the plaintiff need not demonstrate he was damaged nor the amount of his damages in order to obtain judgment against the wrongdoer. *Citronelle*, *supra*, 669 F.2d at 722. The Majority below misconstrued this language to ignore utterly the compensatory purpose of restitution, elevating disgorge-

---

[30]In *Citronelle*, TECA suggested several procedural devices by which restitution to individual purchasers could be achieved, including intervention and interpleader. 669 F.2d at 722. Under the precedents for intervention, as well as the case law of interpleader, those claiming an interest in the fund are individually to be heard upon their claims. *See, e.g., Maryland Casualty vs. Santer*, 344 F.Supp. 433, 437 (N.D. Miss. 1972).

[31]*See* cases cited at note , *supra*.

ment to be the exclusive purpose for restitution, a holding at odds with *Citronelle* and with this Court's decisions in *Porter*, *Interstate Natural Gas*, and *Morgan II*, cited above.

### 3. THE DECISION BELOW AUTHORIZES AN UNLIMITED DISCRETION TO TRIAL JUDGES FORMULATING A "RESTITUTIONARY" REMEDY AND THEREBY PORTENDS INCREASED LITIGATION.

By upholding as "restitutionary" the disbursement of $2 billion for indigent relief programs, with no evidentiary nexus between this distribution and the overcharges intended to be remedied, and indeed with no evidentiary foundation whatsoever, the Court of Appeals has climbed aboard an unruly tiger that roams well outside the historical understanding of compensatory equitable restitution. The very size of the judgment assures the instant case will have a precedential impact beyond cases involving Section 209 of the ESA.

In fact, the danger of the decision below is three-fold. First, it invites trial judges to apply their own predilections in fashioning equitable remedies where the funds before them are very large and the factfinding procedures to identify injured persons appear somewhat forbidding and complex.[32] The fact that formulating an adequate remedy in a complex matter is formidable does not excuse its undertaking. *Bigelow vs. RKO Radio Pictures,* 327 U.S. 251, 265-266, 66 S.Ct. 574, 580 (1946). Yet in resolving complex problems, the legitimacy of remedies lies in their

---

[32]Resort to a philanthropic impulse in such circumstances is not unique to the District Court below; in January 1981, DOE Special Counsel Paul Bloom gave $4 million in overcharge settlements to the Salvation Army and three religious charities without authorization. "Energy Office Reports Former Counsel Gave $4 Million To Charity," *New York Times,* Section A, Page 1, Column 4 (Feb. 13, 1981). Such a distribution is not restitutionary if it prevents compensation to identifiable injured purchasers, as it does in the instant case.

adherence to settled principles, for inescapably in some of their details, remedies in complex cases must be innovative. It is all the more important, therefore, that their core rest firmly on settled law.

Second, the controlling future force of TECA's decision, if left unreviewed, should not be ignored. That Court of Appeals has exclusive jurisdiction for cases decided under the ESA. The instant case is only the first involving massive distribution of crude oil overcharges. Awaiting decision before the District Court in Kansas is the *Stripper Well Litigation,* MDL-378, in which adjudicated crude oil overcharges exceed $1 billion, including accrued interest. The DOE has advised Congress there remain at least $6 billion in further cases of crude oil and petroleum price overcharges still unresolved in dozens of administrative and judicial enforcement actions.[33] Under the instant decision, trial judges may avoid factual inquiry and assert their personal preferences for the expenditure of these billions of dollars of overcharges, without specific restitutionary direction from this Court; compensation of injured purchasers is unlikely and the risk is intensified that remedies chosen will not further statutory objectives.

The third danger of permitting the decision below to remain unreviewed is related. The District Judge below has wandered beyond restitution, and perhaps beyond the judicial province, to infringe upon budgetary judgments best left to the Congress. Under the Warner Amendment,

---

[33] *See* Department of the Interior and Related Agencies Appropriations for 1986, Hearings Before a Subcommittee of the Committee on Appropriations House or Representative, Ninety-Ninth Congress (1st) Session, at pp. 248-249, testimony of Rayburn Hanzlik, the Administrator of the Economic Regulatory Administration. Mr. Hanzlik is the principal enforcement official for price controls in the DOE and is primarily responsible of overseeing litigation arising out of violation of these regulatory controls. These cases are separate from the litigation in which the OHA Report was issued, *In Re DOE Stripper Well Exemption Litigation*, MDL No. 378 (D.Kan.) in which the adjudged violation exceeds $1 billion with interest.

Congress allocated $200 million to be used on financial assistance to relieve the energy needs of the indigent, with the understanding this allotment was a one-time disbursement in the midst of freezing winter. The District Court's holding operates as a second disbursement, increasing the non-congressional expenditure on these programs by a factor of ten-fold. If more and more trial judges are given unguided discretion in framing remedies of their choice under Section 209, they risk encroachment upon the appropriate domain of the Congress, under the guise of "restitution" bearing *no nexus* to overcharges.

In the instant case, where common law principles of restitution have been misunderstood and misapplied by TECA, the intervention of this Court is assuredly warranted and would be beneficial for the future guidance of TECA and the trial courts.[34]

---

[34]Its limited exclusive jurisdiction and the esoterica of energy pricing rules have insulated TECA from review. The modest caseload of TECA also explains in part why this heavily burdened Court cannot often supervise it. In the past five years, *every* year the Court has reviewed every circuit from 3 to 33 times. *See* Annual Report of the Administrative Office of the United States Courts, Table B-2, 1980-84. In the same period, this Court has reviewed only one TECA decision. *Tully vs. Mobil Oil Corp.*, 455 U.S. 245, 102 S.Ct. 1047, 71 L.Ed. 2d 120 (1982), involving a state sales tax and preemption questions.

Notwithstanding its limited jurisdiction, the cases before TECA involve the same questions of administrative law, judicial review, and procedures that confront all other Courts of Appeals. Judges in the Courts of Appeals readily cite and rely upon the opinions of their brethren in other circuits. Thus, the remaining Courts of Appeals cited opinions of the District of Columbia Circuit in 1984 in 1,189 decisions, according to LEXIS. It is noteworthy, then, that in fewer than six decisions have other Courts Appeals cited the opinions of TECA in its entire history of 13 years, except to address the boundaries between their own and TECA's special jurisdiction. This may bespeak their apprehension that the insulation of TECA has rendered it less sensitive to the common law.

## CONCLUSION

For the reasons set forth, the Petition for Writ of Certiorari should be granted.

Dated: September 14, 1985

Respectfully submitted,

RICHARD T. WILLIAMS*
NAOMI A. BRUNNER
KADISON, PFAELZER, WOODARD, QUINN & ROSSI
707 Wilshire Blvd., 40th Fl.
Los Angeles, California 90017
(213) 688-9000
*Attorneys for Air Transport Association of America*

ALPHONSE M. ALFANO
DOUGLAS B. MITCHELL
BASSMAN, MITCHELL AND ALFANO
Suite 1000
1707 H Street, N.W.
Washington, D.C. 20006
(202) 466-6502
*Attorneys for Petroleum Marketers Association of America and The Jobbers' Group*

JERRY S. COHEN
MICHAEL D. HAUSFELD
PATRICIA F. BAK
KOHN, MILSTEIN, COHEN & HAUSFELD
Suite 600
1401 New York Ave., N.W.
Washington, D.C. 20005
(202) 628-3500
*Attorneys for Independent Gasoline Retailers*

* Counsel of Record